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March 24, 2004

Fair Political Practices Commission

428 J Street, Suite 800

Sacramento, CA 95814

Re Conflicts of Interest - Proposal to Merge Government Code Section 1090 into the Political Reform Act

Ladies and Gentlemen

Our office provides legal services and advice to all departments and agencies of the County of Tulare, and to 48 school districts located in the county, the Tulare County Office of Education and the College of Sequoias Community College District. We provide conflict of interest advice to many local public officers and employees. The purpose of this letter is to provide written comments to your Commission concerning the proposal to merge Government Code Section 1090 (hereafter "Section 1090") into the Political Reform Act (hereafter "PRA").

Our position is that it would be beneficial for local public officers and employees in ensuring more effective compliance if Section 1090 were merged into the PRA. It is our experience in advising government officials that there is a great deal of ignorance, misunderstanding and confusion regarding the requirements of Section 1090. The ignorance stems, we believe, from the rather vague nature of the Section 1090 statutes, and the fact that government officials have very few sources of education and training regarding Section 1090 requirements. The misunderstanding and confusion stems from several major distinctions between Section 1090 and the PRA.

The local officials that we serve are almost totally dependent on our office and other legal counsel for their knowledge and understanding of the requirements of Section 1090. While our office provides education materials and training regarding Section 1090, we find that local officials continue to struggle with understanding of what is essentially a highly technical law. *Enclosed you will find some of the materials we have developed to help local officials understand the requirements of Section 1090 and its distinction from the PRA.*

As you know, Section 1090 provides simply:

Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

The remaining statutes that comprise Section 1090 for the most part define remote and non-interest exceptions. Simply stated, Section 1090 prohibits public officials from *making a contract* in which they have a *financial interest*. Yet, the statutes do not define key components of the prohibition such as what constitutes a contract, what constitutes a financial interest, and what constitutes the making of a contract? In order to determine these crucial factors, legal counsel must consult a myriad of California Attorney General Opinions and court decisions on the subject. This is virtually impossible for government officials to do themselves.

Moreover, the remote and non-interest exceptions to Section 1090 are very technical and specific, and are difficult for government officials to understand and apply without the help of legal counsel.

Finally, a violation of Government Code Section 1090 can involve serious civil and criminal penalties. The standard for a criminal violation does not appear to be high. It is our experience that government officials may unwittingly violate the highly technical requirements of Section 1090 which can lead to serious consequences, including felony criminal sanctions.

Moreover, there are several major distinctions between Section 1090 and the PRA which in our experience cause misunderstanding and confusion on the part of government officials subject to the law. For example, a board is absolutely barred from entering into a contract in which one of its members has a financial interest. Abstention by the financially interested board member is not an option, unless one of the limited remote interest exceptions apply. This is not the case with the PRA, where a government official with a financial interest in a government decision may avoid a conflict of interests by abstention. This is further complicated by the fact that an employee, as opposed to a board member, may abstain from any involvement in the contract-making process in order to avoid a violation of Section 1090. We find that many officials are confused by these fine distinctions.

We also believe that government officials struggle with an understanding of when Section 1090 and/or the PRA applies to their decisions. They often do not realize the broad scope of Section 1090 and do not understand that, pursuant to legal precedents, Section 1090 applies to a variety of everyday government transactions that involve the purchase, sale or lease of goods, supplies, equipment, property or services. In addition, they have trouble understanding that both laws may

apply at the same time. For example, where one of the remote or non-interest exceptions to Section 1090 applies, officials do not always understand that they still need to insure compliance with the PRA.

With this background in mind, we will hereafter respond to the specific issues raised by the Commission:

ISSUES

1. Is the Merger a Good Idea?

For the reasons stated above, we believe the merger is a good idea.

2. Advice Function: Should the Commission provide advice regarding compliance with section 1090?

Absolutely. We believe that local government boards and officials need a quick and efficient system to access advice to insure compliance with Section 1090 similar to what the Commission provides for the PRA. For example, your Internet website is a good source of information and access to advice. Now, officials are virtually dependent on the accessibility of legal counsel to meet this need for Section 1090.

a. Should the advice be limited in some manner?

We do not perceive a reason to limit advice in light of the fact that Section 1090 is complex, obtuse and high technical. As one example, legal precedents have held that even the future expectation of economic benefit may be enough of a financial interest for purposes of Section 1090.¹ We doubt that many government officials understand the many subtleties of Section 1090.

b. Should the Commission obtain input from other interested persons (such as the District Attorney's Association) prior to providing advice?

Yes. I am personally aware of three local government officials who have been criminally prosecuted for violations of Section 1090 over the years. The standard for a criminal violation does not appear to be high.²

c. Should advice only be informal?

Not necessarily. We believe that well-meaning government officials need a mechanism for insuring that their actions are consistent with the requirements of Section 1090, and by which they can be immune from civil and criminal liability.

3. Specific Language: Should the Commission redraft the section 1090 provisions in order to clarify the law?

Absolutely. We believe this would be highly beneficial so that government officials may have greater clarity and certainty about the requirements of Section 1090.

This might include the following:

a. Should "contract" be defined? For example, should the definition include development agreements [70 Ops.Cal.Atty.Gen. 230], grants, payment of salary and reimbursement of expenses for public employment [75 Ops.Cal.Atty.Gen. 20]?

Yes. What constitutes a "contract" for purposes of Section 1090 has been broadly interpreted.³ We believe there is a great deal of confusion on the part of officials about what constitutes contract, and that some officials might give the term a more formal and limited meaning than is actually the case.

b. Should "official capacity" be defined? For example, should it include participation in preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation of bids? [Millbrae Assn for Residential Survival v. City of Millbrae (1968) 262 Cal.App.2d 222.] The phrase also includes decisions to make, modify, extend, or renegotiate a contract. [City of Imperial Beach v. Bailey (1980) 103 Cal.App.3d 191.] Board members are conclusively presumed to be "involved" in contracts under the Board's jurisdiction. [Thomson v. Call (1985) 38 Cal.3d 633.]

Yes. Moreover, what constitutes the making of a contract should be defined. This is a technical point which we must repeatedly explain to the government officials we serve. Some government officials may erroneously think that the "making" of a contract for purposes of Section 1090 means only the formal approval by a governing body.

c. Should the term "financially interested" as used in section 1090 be defined? For example, should the legislation expressly define the term to include both direct and indirect interests in a contract? [Thomson v. Call (1985) 38 Cal.3d 633.] Should the legislation expressly provide that the term "financially interested" not be synonymous with the term "financial interest" as used in section 87100 and 87103?

Yes. It is clear from the nature of the statutorily defined remote and non-interests exceptions, as well as from legal precedents, that a financial interest may be quite indirect. While officials may understand that Section 1090 would prohibit them or their spouse from contracting directly in a personal capacity with the government agency they serve, we do not believe they understand that the prohibition of Section 1090 applies equally to a variety of more subtle and indirect types of financial interests. For example, we do not believe officials fully

understand that Section 1090 prohibits contracts by governing board with an outside party such as another government agency, a non-profit corporation or a private business with which a board member has a relationship of an economic nature. This economic relationship may be quite indirect yet still give rise to a prohibited financial interest on the part of the public official. The prohibition extends further to include such indirect financial interests on the part of the officials spouse. The prohibition has been interpreted to extend even further to include an economic relationship a public official's spouse has with a party who is not the contracting party but has an economic relationship with the contract party - a very indirect type of financial interest.⁴


- 4 Workload Impacts: Expansion of the Act results in greater workload. Staff is requesting feedback as to the workload and other administrative commitment that may be created by merging these other provisions into the Act.

We believe that there would be significant workload and other administrative commitments involved with providing government officials with the education, training, advice and enforcement necessary to insure proper compliance with Section 1090 requirements. However, we believe this is a necessary result of insuring that Section 1090, and the principles it embodies, is an effective law.

In conclusion, we believe that local government officials and employees of all types, and the public whom they represent would greatly benefit from a merger of Section 1090 into the PRA, and that a merger would provide for a more consistent and uniform structure for the education, compliance and enforcement of Section 1090 prohibitions and requirements.

We would be happy to assist the Commission in any way that we can with a merger or a reform of these important conflict of interest laws.

Very truly yours,
KATHLEEN BALES-LANGE
County Counsel

By 
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Chief Deputy County Counsel

cc: Kathleen Bales-Lange
Brian Haddix, County Administrative Officer
Jim Vidak, Tulare County Superintendent of Schools

People v. Gnass (2002) 101 Cal.App.4th 1271; 86 Ops.Cal.Atty.Gen 138 (2003).

2. *People v. Honig* (1996) 48 Cal.App.4th 289, 333 and 338.
3. *People v. Honig, supra*, 48 Cal.App.4th 289; *People v. Gnass, supra*, 101 Cal.App.4th 1271; 75 Ops.Cal.Atty.Gen. 20 (1992).
4. See, 85 Ops.Cal.Atty.Gen 34 (2002).